SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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MJ DUKE SOLUTIONS LTD.,
t/a MICHAEL DUKE PRODUCTIONS

Index No.
652972/2013

Plaintiff,

- v -

DECISION and ORDER

Mot. Seq. 001

FREYJA FILMS, LLC and BETH L. BAUM,
a/k/a BETH LAUREN

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

This is an action for breach of contract and unjust enrichment based on an independent film producer's alleged failure to repay certain loans allegedly advanced to it in connection with the production and financing of a film. Plaintiff MJ Duke Solutions, Ltd. ("MJ Duke" or "Plaintiff") claims to have advanced seven loans to defendants Freyja Films, LLC ("Freyja Films") and Beth L. Baum a/k/a Beth Lauren ("Baum") (collectively, "Defendants") during the period between April 14, 2010 and November, 2011, in the total principal amount of $261,306.72. Plaintiff claims to have demanded repayment of the subject loans, that Defendants failed to repay Plaintiff, and that the full amount of $261,306.72, with interest from November 30, 2011, remains due and owing to Plaintiff.

Plaintiff commenced the instant action on August 23, 2013, by summons and complaint. Plaintiff now moves for an order, pursuant to CPLR § 3215(b), directing the entry of judgment in favor of Plaintiff and against Defendants in the amount of $261,306.72 with interest from November 30, 2011.

In support, Plaintiff submits the attorney affirmation of Arthur J. Techburg; a copy of a statement of account totaling $261,306.72; a copy of Plaintiff's summons and verified complaint; the affidavit of service upon Freyja Films via the Secretary

of State, dated August 28, 2013; and, the affidavit of service upon individual defendant Baum, dated September 9, 2013; and the affidavit of additional service upon Defendants via first-class mail pursuant to CPLR § 3215(g).

Defendants oppose. Defendants cross-move for an Order, pursuant to CPLR §§ 3211(a)(1) and (a)(7), dismissing Plaintiff's complaint; or, alternatively, pursuant to CPLR § 3012(d), compelling Plaintiff's acceptance of a late answer. In support, Defendants submit the attorney affirmation of Robert R. Viduch. Annexed thereto is a copy of Defendants' verified answer in the proposed form. Defendants further submit the affidavit of Baum; a copy of a promissory note (the "Promissory Note"), and accompanying transmittal letter, in the principal amount of $100,000.00, dated May 18, 2010.

Plaintiff opposes Defendants' cross-motion.

CPLR § 3215 provides, in relevant part: "On any application for judgment by default, the applicant shall file proof ... of the facts constituting the claim, the default and the amount due by affidavit made by the party." CPLR § 3215(f) permits a party to use a verified complaint as the "affidavit of facts constituting the claim." (CPLR § 3215[f]). The standard of proof on an application for judgment by default is not stringent, "amounting only to some firsthand confirmation of the facts". (*Feffer v. Malpeso*, 210 A.D.2d 60, 61 [1st Dep't 1994]). Thus, a complaint that is verified by an attorney may be sufficient to support the entry of a default judgment, so long as the attorney has first-hand knowledge of the facts constituting the claim. (*see Joosten v. Gale*, 129 A.D.2d 531, 534 [1st Dep't 1987] ["A complaint verified by an attorney, although permissible under CPLR 3020 (d) (3) where, as here, the client is not in the county where the attorney maintains his office, is insufficient for purposes of CPLR 3215 (e) *when the attorney lacks personal knowledge of the facts constituting the claim.*"] [emphasis added]).

Here, Plaintiff submits a complaint verified by counsel as proof of the facts constituting the claim. Insofar as the verification states that counsel has personal knowledge of the facts alleged, Plaintiff's verified complaint provides sufficient "first-hand confirmation" of the facts constituting the claim to support the entry of a default judgment pursuant to CPLR § 3215.

Turning now to Defendants' cross-motion, "the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such

terms as may be just and upon a showing of reasonable excuse for delay or default." (CPLR § 3012[d]). Additionally, in order to be permitted to serve an untimely answer as timely, a defendant must provide both a reasonable excuse for the delay and demonstrate potentially meritorious defenses to the action. (*Pagan v. Four Thirty Realty LLC*, 50 A.D. 3d 265, 266 [1st Dep't 2008]).

In the affidavit of Baum, Baum avers that she is the managing member of Freyja Films. Baum avers:

> In or around October of 2011, I sought permanent financing from a third-party who, after receiving a $14,069 fee from Freyja Films, apparently left the country in 2012 with that fee but without providing any of the promised financing. As a result of the stress endured in connection with that and other stress factors, I suffered mental and emotional distress requiring me to seek and receive medical care (brief hospitalization) for a near nervous breakdown.

Baum further avers:

> On or about September 24, 2013, I appeared in this lawsuit, and following a motion via order to show cause, was granted additional time to respond to Plaintiffs complaint (as it was served at a former address and I had only received it the day before appearing in court). However, Defendants ultimately did not respond to the complaint as I was unable to locate and hire counsel who would accept an upfront retainer which I and Freyja Films could actually afford. Furthermore, I became unsure whether I should respond as I was seriously contemplating filing for protection under the bankruptcy laws and then, after not having heard at all from Plaintiff regarding this lawsuit (or otherwise) for several months, came to believe that Plaintiff would no longer prosecute this lawsuit.

Baum avers that, "[o]n June 9, 2014,1 learned that Plaintiff had filed a motion for a default judgment and within seven days I was finally able to locate and retain

counsel (Robert R. Viducich) who did not demand an upfront retainer which I and Freyja Films could not afford." In addition, Baum's affidavit states:

> In May 2010, Plaintiff provided a bridge loan in the amount of $ 100,000 and received in return a promissory note, dated May 18,2010, that Mr. Duke had required from me (herein, the "Promissory Note"). My understanding, based on the Promissory Note's language and my prior (and subsequent) communications with Mr. Duke, was that the document's terms called for me to pay Mr. Duke $110,000 within three months of receiving the loan - that is, a return of the $100,000 loaned plus $10,000 (10%) interest no later than August 1, 2010 (if not sooner). Attached hereto as Exhibit 1 is a copy of the Promissory Note (and accompanying transmittal letter). The Promissory Note is the only document I signed on an individual basis regarding any amounts provided by Plaintiff.

Baum also avers:

> I believe that the total amount of funds provided received from Plaintiff (for Freyja Film's benefit) is approximately $190,000, not the $261,306.72 amount of alleged "loans" referenced in the Complaint, or its "Exhibit A" - which exhibit is not a document (or listing of alleged debts) that Plaintiff (or Mr. Duke) ever sent to me, or that I had otherwise ever seen prior to being served with a copy of the Complaint.

Here, Defendants fail to present a reasonable excuse for entity defendant Freyja Films' default. Frejya Films did not appear on Baum's Order to Show Cause, and failed to otherwise appear in this action prior to Plaintiff's motion for default. Although an LLC is required to appear by counsel, the LLC's inability to afford counsel does not, without more, provide a reasonable excuse for default (see generally, *Abbott v. Crown Mill Restoration Dev.*, LLC, 109 A.D.3d 1097, 1099 [4th Dep't 2013] [finding that, "a party's failure to retain counsel when provided sufficient time in which to do so does not constitute a reasonable excuse for a

default"]). In light of Defendants' failure to present a reasonable excuse for Freya Films' default, the issue of a meritorious defense need not be addressed as to this defendant. Accordingly, Plaintiff is entitled to the entry of a default judgment as against Freyja Films.

However, as far as individual defendant Baum is concerned, Baum adequately sets forth a sufficient showing of a meritorious defense to Plaintiff's complaint as against Baum individually. Accordingly, in light of Baum's initial appearance, Plaintiff's failure to demonstrate that it suffered any prejudice resulting from the delay, and in view of New York's general policy of favoring the disposition of controversies on the merits, (*Warbett v. Polokoff*, 250 N.Y.S.2d 633, 634 [1st Dep't 1964]; *Pagan v. Four Thirty Realty LLC*, 50 A.D.3d 265 [1st Dep't 2008], permission to file a late answer is warranted with respect to Baum.

Wherefore, it is hereby

ORDERED that Plaintiff's motion for default judgment is granted only as against entity defendant Freyja Films; and it is further

ORDERED that the clerk is directed to enter judgment in favor of Plaintiff and against defendant Freyja Films in the sum of $261,306.72, with interest at the statutory rate (from 11/30/2011), as calculated by the Clerk, together with costs and disbursements, as taxed by the Clerk; and it is further

ORDERED that Plaintiff's motion for default judgment as against individual defendant Baum is denied; and it is further

ORDERED that the verified answer in the proposed form will be deemed filed and served upon service of a copy of this Order with notice of entry.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: February 6, 2014

FEB 06 2015

EILEEN A. RAKOWER, J.S.C.

HON. EILEEN A. RAKOWER